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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

C.S., by and through his Conservator, MARY STRUBLE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF EDUCATION, a State Agency,

Defendant.

Case No.: 08 CV0226 W AJB

DEFENDANT RON DIEDRICH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF CHIEF ADMINISTRATIVE LAW JUDGE OF THE STATE OF CALIFORNIA OFFICE OF ADMINISTRATIVE HEARINGS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Hearing: April 28, 2008

Judge: The Honorable Thomas J. Whelan

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Defendant Ron Diedrich, in his official capacity as Director and Chief Administrative Law Judge of the State of California Office of Administrative Hearings ("OAH") respectfully submits the following memorandum in opposition to plaintiff's motion for a temporary restraining order.

INTRODUCTION

Plaintiff's motion for a temporary restraining order enjoining the California Department of

Education ("CDE") from contracting with OAH fails in every aspect to meet the required standards for a temporary restraining order or preliminary injunction.[1/] Plaintiff seeks to obtain an order to prevent CDE from renewing a contract with OAH by which OAH provides administrative due process hearings and mediation to students with disabilities or school districts who request such dispute resolutions. CDE is required by federal law to provide the due process hearings to parties, both students and school districts, who request them to resolve special education disputes pursuant to the federal Individuals with Disabilities Education Improvement Act ("IDEIA").[2/] OAH provides the administrative law judges who oversee the hearings and the mediations. Contrary to plaintiff's allegations, the judges are dedicated, well-trained, highly experienced legal professionals who have more experience and training than required by federal law.

Plaintiff has no likelihood of eventual success on the merits and indeed failed to argue that he does. Fundamentally, plaintiff has shown no irreparable harm as he has a separate pending appeal of his due process hearing decision in a separate federal court. Moreover, plaintiff presented no evidence to demonstrate that he has a valid claim pursuant to IDEIA or the Equal Protection Clause of the Fourteenth Amendment, much less that he would likely succeed on these claims.

Importantly, granting plaintiff's request would severely impair the public interest by

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1. We understand the Court to be treating this motion for a temporary restraining order as a preliminary injunction. Because of the "complex and important nature of the issues," the Court ordered that the temporary restraining order proceed as a noticed motion. February 20, 2008 Order at p. 2. Additionally, the Court noted that the noticed motion procedure would expedite appellate review. *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 87-88 (1974)). Of course, if this motion was considered under a temporary restraining order standard, it would be an even steeper hurdle for plaintiff to surmount. Under either standard, no basis for provisional relief is warranted.

2. Originally enacted as the "Education for all Handicapped Children Act of 1975," Pub. L. No. 91-142, 89 Stat. 773 (1975), this legislation was, in 1997, significantly amended to its current form and renamed the Individuals with Disabilities Education Act ("IDEA"), Pub. L. No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1400 et seq. The IDEA was reauthorized in 2004 as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (2004).

impeding a vast majority of parties who seek dispute resolution in the special education context from obtaining relief. On the other hand, plaintiff presented no credible evidence that he faces irreparable harm if this injunction is not granted, as his own appeal of his due process hearing decision is pending in another court. Thus, plaintiff has nothing at stake in this litigation that suggests he would be irreparably harmed if the injunction is denied.

The hardships in this litigation weigh heavily in favor of protecting the public interest by maintaining the status quo of OAH performing special education due process hearings and mediations pending the ultimate outcome of this litigation. OAH respectfully requests that this Court deny plaintiff's request for a preliminary injunction.

STATEMENT OF FACTS

Procedural History

Plaintiff commenced this action against CDE on February 5, 2008, and on February 19, 2008, plaintiff moved for a temporary restraining order. By order of the Court, the hearing for the temporary restraining order was set for April 28, 2008. *See* March 7, 2008 Order. Additionally, the Court granted OAH's motion to intervene as a defendant on April 7, 2008. *See* April 7, 2008 Order.

Plaintiff C.S. by and through his Conservator, Mary Struble ("Plaintiff") brought this action as a class action complaint against defendant CDE. Complaint at p. 1. Plaintiff asserted jurisdiction pursuant to 28 U.S.C. § 1331 because the action arises under the IDEIA and related regulations. *Id.* at ¶¶ 1-2. The action is brought as a class action on behalf of all special education students and their parents who had administrative due process hearings heard by OAH between July 1, 2005 and the present (the "Class Period") and who, plaintiff alleges, received less than complete relief as afforded under IDEIA. *Id.* at ¶¶ 3-4.

Provisions of IDEIA

IDEIA was enacted to "ensure that all children with disabilities have available to them a free appropriate public education. . . designed to meet their unique needs and prepare them for further educational, employment, and independent living." *Van Duyn ex rel. Van Duyn v. Baker School*

Dist. 5J, 502 F.3d 811, 817-18 (9th Cir. 2007); *see* U.S.C. § 1400(d)(1)(A), (B). One of the mechanisms for achieving these goals is the formulation and implementation of Individual Educational Placements ("IEP"). *Id.* "Under § 1414(d), every disabled child must have an IEP drafted and put into effect by the local educational authority. The IEP is to be formulated by a team that includes the child's parents, regular and special education teachers, a district representative and other individuals with relevant expertise." *Id.* The child's parents are entitled to participate in meetings regarding the IEP and must receive written notice of any proposed changes to the IEP. § 1415(b). Either the child's parents or the local educational authority may bring a complaint to the state educational agency about any matter relating to the IEP or the child's free appropriate public education. § 1415(b)(6), (7).

If the complaint is not resolved, a due process hearing may be requested and held to determine "whether the child received a free appropriate public education." § 1415(f)(3)(E)(i). IDEIA requires that the hearing be conducted "by the State education agency or by the local education agency, as determined by State law or by the State educational agency" and requires that the "person conducting the [due process] hearing. . . shall, at a minimum:"

> (i) not be –
> (I) an employee of the State educational agency or the local education agency involved in the education or care of the child; or
> (II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
> (ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;
> (iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
> (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

IDEIA § 1415(f)(3)(A).

After going through the due process hearing and any other available administrative remedies available to the party, an aggrieved party may file a civil action in state or federal district court to appeal the decision. § 1415(i)(2)(A).

IDEIA Due Process Hearings

Federal and state law provide that parties (either a parent and student or a school district)

have the right to request a due process hearing challenging a student's individual education placement. § 1415(f)(3)(E)(i). The law also provides the parties the opportunity to attempt to resolve their dispute through a mediation process. Traditionally, in California, every request for due process hearing is also considered a request for mediation, and a mediation date is scheduled in response to hearing requests. Laba Dec. ¶ 10. The mediation process remains voluntary, but the vast majority of parties elect to participate in mediation. Laba Dec. ¶ 10. Because the majority of cases are successfully mediated, settled or dismissed about 3 to 5 percent of requests for due process hearings ultimately result in a hearing and the issuance of a decision from OAH. Laba Dec. ¶ 11.

OAH and CDE Contract Requirements

During the Class Period, CDE and OAH entered into and were bound by an Interagency Agreement ("Contract"). The operative contract was approved June 8, 2005 and amended on March 1, 2007 and June 28, 2007. Laba Dec. ¶ 5 (attached as Exhibits 2, 3 and 4, respectively).

Pursuant to the Contract, OAH agreed to provide hearing and mediation services, pursuant to state and federal law with respect to requests made for dispute resolution under IDEIA. Laba Dec. ¶ 5, Ex. 2. OAH agreed to maintain or provide administrative, supervisory, information technology and other support staff to operate the mediation and hearing process. *Id.* The term of the Contract is June 1, 2005 through June 30, 2008. *Id.* at 1.

Training and Experience of Administrative Law Judges

In particular, the Contract requires that administrative law judges performing due process hearings pursuant to IDEIA receive eighty (80) hours of training in the first year the judge is performing hearings and a minimum of twenty (20) hours every year thereafter. Laba Dec. ¶ 6.

Pursuant to these terms of the Contract, every administrative law judge employed by OAH for at least one year in the special education division has completed the requisite 80 hours of training in areas related to special education and the administrative process in the first year of employment. Additionally, every administrative law judge employed by OAH in this division longer than one year has completed a minimum of 20 hours of training each subsequent fiscal year. Laba Dec. ¶ 9.

The administrative law judges employed by OAH in the special education division are all lawyers, have more than five years of experience in the practice of law prior to working for OAH and are members of the California bar. Laba Dec. ¶ 9. Three of the administrative law judges employed by OAH in the special education division are former administrative law judges from the Special Education Hearing Office located at McGeorge School of Law ("SEHO"), who performed similar services under a previous CDE contract. Laba Dec. ¶ 9.

Plaintiff's Allegations

Plaintiff alleges that the administrative law judges conducting special education hearings for OAH failed to obtain the training required by the Contract, failed to meet the qualifications specified in the Contract and did not conduct the hearings pursuant to applicable law. Complaint at ¶¶ 7-9, 30, 34, 45-53; Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order ("TRO Br.") at pp. 2-4, 7:26-28. Additionally, plaintiff alleges that OAH has misrepresented data provided to CDE with respect to the administration of mediations and due process hearings conducted by OAH. Complaint at ¶¶ 54-68. Plaintiff also alleges that administrative law judges employed by OAH violated the Contract by presiding over non-special education cases, failing to provide proper educational records to students and parents when requested, unlawfully delegating the decision regarding compensatory education to the school district, allowing unauthorized discovery in the due process proceedings and mishandling conflict of law analysis. Complaint at ¶¶ 69-95.

Plaintiff also alleges that defendant CDE initially did not want to award the Contract to OAH, but did so in order not to lose federal funding. Complaint at ¶¶ 96-105. Currently CDE and OAH are negotiating a contract that would be effective July 1, 2008. Complaint at ¶¶ 3, 37 and p. 36 at ¶ 1.

Plaintiff does not seek to challenge the decision in his own due process hearing as that is the subject of separate litigation in federal district court. *See* TRO Br. at 10:8-12.

Plaintiff seeks a temporary restraining order and preliminary and permanent injunctions enjoining defendant CDE from renewing or otherwise awarding the Contract to OAH effective July 1, 2008. Complaint at p. 36, ¶ 1.

ARGUMENT

Plaintiff failed to meet the stringent standard required to obtain preliminary injunctive relief. A plaintiff seeking a preliminary injunction must show the following:

> (1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving] party will not be harmed more than the [moving party] is helped by the injunction, and (4) granting the injunction is in the public interest.
>
> Alternatively, a court may issue a preliminary injunction if the moving party demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits.

Stanley v. University of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994) (quoting *Martin v. International Olympic Committee*, 740 F.2d 670, 674-75 (9th Cir. 1984)), *cert. denied*, 528 U.S. 1022 (1999). "Under either test, however, the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected." *Caribbean Marine Services Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiff failed to show that he meets either of these tests.

Plaintiff's evidentiary burden in seeking provisional relief in advance of trial is even more rigorous when the plaintiff seeks to enjoin governmental action taken in the public interest pursuant to statutory provisions. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2nd Cir. 1995); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992). Additionally, where a party seeks mandatory preliminary relief that goes beyond maintaining the status quo, courts should be extremely cautious about issuing a preliminary injunction. *Stanley*, 13 F.3d at 1319.

Any showing of likelihood of success must be "clear" or "substantial" where the requested preliminary injunction "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at trial on the merits." *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 150 (2nd Cir. 1999); *see also Larry P. v. Riles*, 502 F.2d 963, 965 (9th Cir. 1974). Plaintiff seeks a temporary restraining order to enjoin

CDE from contracting with OAH for the Contract for the fiscal year starting July 1, 2008, which would effectively obtain the ultimate relief sought by plaintiff and could not be undone even after defendants ultimately prevail in this matter. The severe damage to the public interest is that there would be no contract in place with CDE to insure that mediations and due process hearings are performed for students and school districts who seek such relief from the State.

Under any standard and particularly under the rigorous standards disfavoring preliminary injunctions applicable here, plaintiff's motion for a preliminary injunction must be denied.

I.

Plaintiff Fails to Meet His Burden of Proving an Actual or Even Possible Irreparable Injury.

Plaintiff's allegations, unsupported speculation and innuendo fail to demonstrate any irreparable injury. Even leaving aside that there has been no violation of IDEIA or the Equal Protection Clause of the United States Constitution, plaintiff has failed to establish any such hypothetical violation which would represent an irreparable injury in the present circumstances.

"A preliminary injunction may only be granted when the moving party has demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (affirming the district court's denial of preliminary injunctive relief). Here, there is no viable argument that irreparable injury has or will occur. Plaintiff acknowledges that he does not seek to challenge the decision in his own due process hearing, as that is the subject of separate litigation in federal district court. Thus, his own immediate educational opportunities are not at issue here. *See* TRO Br. at 10:8-12.

Plaintiff presents no evidence, much less a showing of a "significant threat," of the alleged harm which he describes only in terms of abstract speculation. *Simula, Inc.*, 175 F.3d at 725. Speculative injury is not enough to support a claim of "irreparable" injury. *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1988). Plaintiff argues irreparable harm has occurred based on the alleged conduct of OAH administrative law judges, including finding for students "only 10% of the time" (at p. 9-10 TRO); and "students have been sitting at home, deprived of any education based upon the unlawful conduct of the school district and the inability to obtain

appropriate relief from OAH." TRO at p. 10. To begin with, it is pure speculation to suggest that any supposed past percentage would hold in the future.

In any event, this argument is simply not indicative or probative as to any irreparable harm. Statistics of "win-loss" records, of course, are not a valid measure of judicial competence, accuracy or fairness and plaintiff's citations to such statistics only belittles the entire due process hearing process. Many factors weigh into whether a student or the school district will prevail in any given dispute, including who requests the hearing, the substantive complaints and the merits of those complaints and the burden of proof. *See Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that burden of proof is placed on party requesting the due process hearing). Even if this statistic were a proper basis for evaluation, plaintiff's 10% claim is not supported by the evidence. Plaintiff cites exhibits 3 through 10 to the Complaint for support, but these exhibits do not support his claim.[3/] Plaintiff's assertions regarding students being deprived of education because of the inability to receive appropriate relief from OAH is not supported by *any* factual evidence. *See* TRO Br. at p. 10:25-27. Plaintiff concludes that the "court must find that the harm, *per se*, is immediate, irreparable and an ongoing threat to Plaintiff. . . and to other Class Members.[4/] TRO Br. at p. 11:26-27. However, plaintiff failed completely to offer evidence that shows that there is an immediate threat of irreparable harm.

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3. Exhibit 3 shows that in July through December 2005, students prevailed 19% of the time and 31% of the decisions were split decisions, providing relief to both the student and school district. Ex. 3 at p. 3. Exhibit 4 shows that in the first quarter of 2006, students prevailed 10% of the time and received a split decision in 27% of the cases. Ex. 4 at p. 6. Exhibit 5 shows that in the second quarter of 2006, 4 % were decided in favor of students and 29% were split decisions. Ex. 5 at p. 7. Similar statistics exist in Exhibits 6 though 10. See Ex. 6 at p. 5; Ex. 7 at p. 5; Ex. 8 at p. 5; Ex. 9 at p. 5; Ex. 10 at p. 8. Split decisions are exactly that – some of the issues are decided in favor of students and some in favor of school districts – and cannot be seen as a "loss" for students.

4. Plaintiff adds certain arguments about his specific case and substantive arguments regarding that appeal, but this lawsuit is not the proper forum for these arguments. TRO at pp. 10 - 11. As plaintiff specified for the Court, the substantive appeal of plaintiff's due process hearing pursuant to the IDEIA is pending in another matter in the United States District Court, Southern District of California, Case No. 07 CV 2328. There is no call for this Court to be forced to adjudicate the issues of that appeal at all, let alone without the entire administrative record of the appeal before it.

Additionally, plaintiff does not argue (nor could he) that his constitutional claim constitutes irreparable harm, as there is no basis for his Equal Protection claim. A tenuous claim of constitutional infringement is not enough to constitute irreparable harm. *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d at p. 472 (stating that the equal protection claim was too tenuous to constitute irreparable harm); *see also Assoc. General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (organization failed to demonstrate a sufficient likelihood of success on the merits of its constitutional claims to warrant the grant of a preliminary injunction). As discussed, infra at Point II, plaintiff failed to show any likelihood of success on the merits with respect to his Equal Protection claim.

Finally, the separate action not yet being adjudicated, plaintiff essentially failed to exhaust administrative remedies as they relate to this action. This is true as to his action and to the hypothetical class action on behalf of other students. In a similar case, the Ninth Circuit held that parents must exhaust administrative remedies when they mount a class action against the school district and state educational entity challenging school district policies as violations of IDEIA. *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992); *see also Doe v. Arizona Dep't of Education*, 111 F.3d 678, 683-84 (9th Cir. 1997) (holding that juvenile inmate who brought class action against state's department of education alleging violations of IDEIA was required to exhaust administrative remedies first). Plaintiff has sought review of his due process hearing decision in a separate court, but that court has not rendered a decision yet. The outcome of that appeal will require a separate federal court to make findings of fact and decide whether plaintiff's appeal has merit. Essentially plaintiff is asking this Court to make the same decision about the merit of plaintiff's underlying dispute, but without the benefit of a full administrative record. Moreover, there is no evidence that administrative proceedings took place at all for the unsubstantiated claims asserted by plaintiff that "many students have been sitting at home, deprived of any education. . ." *See* TRO Br. at 10:25-27.[5/] Thus, plaintiff's claim here is

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5. Additionally, no exception to the exhaustion doctrine applies in this case. In *Hoeft*, the Court noted that an exception to the exhaustion doctrine would apply where "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law. . .." *Id.* at 1303-04.

premature and he has not shown how this premature claim may constitute irreparable harm.

Plaintiff's allegations and unsupported speculation fail to demonstrate *any* irreparable injury, much less one showing a "significant threat" of harm. Thus, plaintiff's request for a preliminary injunction enjoining CDE from contracting with OAH should be denied.

II.

Plaintiff Fails Even to Assert that He Would Succeed on the Merits, and There is No Likelihood of Success on the Merits.

Nor would any hope for success on the merits support plaintiff's motion for a preliminary injunction, even if the other elements were met. Plaintiff failed to argue that he would succeed on the merits of his claims. Plaintiff's only statement in regard to this required element of provisional relief is a bootstrap reference that alleged violations of the Constitution "add to the likelihood of Plaintiff succeeding on the merits in this case." TRO Br. at 13:7-8. Plaintiff's arguments seem to assert claims for violations of IDEIA and the Equal Protection Clause of the Fourteenth Amendment, but there have been violations of neither here.

First, plaintiff claims that CDE has condoned OAH's violation of IDEIA. IDEIA requires that the "person conducting the [due process] hearing. . . shall, at a minimum:"

> (i) not be –
> (I) an employee of the State educational agency or the local education agency involved in the education or care of the child; or
> (II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
> (ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this title

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The Court further specified that challenges to policies that were alleged to be "contrary to law" exist when questions of law are involved and exhaustion may not be required because agency expertise and an administrative record are theoretically unnecessary to resolve the matter. *Id.* at 1305. Here, although the allegations are of widespread malfeasance by OAH, the underlying challenge is not to a specific law or policy that CDE or OAH maintains, but rather plaintiff challenges the *results* of individual due process hearings and alleges that the results are skewed in favor of school districts. Plaintiff's allegations do not challenge a law or policy, but rather he challenges a perceived bias in the results of due process hearings. This is not a question of law and there is no way to examine these allegations without reviewing individual administrative records and decisions from the due process hearings.

> [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;
> (iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
> (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

IDEIA § 1415(f)(3)(A).

Plaintiff argues that because OAH's administrative law judges do not have the minimum training requirements, are not knowledgeable and experienced in special education law, and do not write decisions in accordance with the letter and spirit of IDEIA, CDE and OAH have violated IDEIA. TRO Br. at pp. 13-14.[6] As a threshold barrier to plaintiff's success on the merits, IDEIA does not actually have minimum training requirements. The statute sets up the procedural safeguards for implementing IDEIA and, in order to receive federal funds, state educational agencies are obligated to meet those safeguards.

In any event, the State has met the safeguards specified in IDEIA and, in this case, exceeded them. For instance, although not required by federal law, every administrative law judge at OAH handling special education disputes is a lawyer and an active member of the California bar, has at least five years of experience in the practice of law and has received extensive training in special education, mediation and administrative matters. *See* Laba Dec. at ¶ 9. Although not required by IDEIA, pursuant to the requirements of the Contract between CDE and OAH, each administrative law judge has 80 hours of specialized training in areas of special education, mediation and the administrative process in the first year of employment and 20 hours in subsequent fiscal years.[7] *See* Laba Dec. at ¶ 9. A majority of the training hours are related to special education. Laba Dec. at ¶¶ 7-8. Administrative law judges also receive training in mediation and the administrative process. Laba Dec. at ¶¶ 7-8. Thus, not only has OAH *not* violated IDEIA, but the administrative law judges who perform the duties specified pursuant to

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6. Plaintiff denotes this "as a violation of the Supremacy Clause," but seems to be making the argument that CDE and OAH are violating IDEIA. TRO Br. at 13:23-28, 14:1-6.

7. Even if administrative law judges did not have the training required by the Contract, as plaintiff incorrectly asserts, this would be at most a breach of contract, and plaintiff would have no standing to assert this claim as plaintiff is not a party to the CDE and OAH contract.

this statute have more training and experience than is required by federal law. Plaintiff failed to submit any evidence to the contrary and failed to demonstrate *any* likelihood of success on the merits on this claim.

Second, plaintiff failed to establish any likelihood of success on the merits of his Equal Protection claim. Plaintiff argues that "in allowing these ALJs to selectively enforce rights of disabled students, districts have been emboldened to eschew the settlement process of mediation, and to go to hearing in an attempt to mislead the ALJ into thinking that IDEA affords district's [sic] more rights than students, which has been endorsed by OAH and CDE to the extreme detriment of disabled students, who, at most are prevailing in due process hearings only 10% of the time." TRO Br. at 14-15. Plaintiff alleges that in interpreting IDEIA in a manner that favors school districts, OAH has violated the Equal Protection Clause. *Id.*

The Equal Protection Clause of the Fourteenth Amendment commands that all persons similarly situation should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The general rule with respect to the Equal Protection Clause is "that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The general rule only gives way when a statute classifies by race, alienage, or national origin or when state laws "impinge on personal rights protected by the Constitution." *Id.* at 440 (internal citations omitted).

Absent particular circumstances that would trigger "strict scrutiny," a state law challenged on Equal Protection grounds thus must be upheld if it has any plausible relationship to a legitimate government purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976). State policy makers are given wide latitude to promote policies and to work toward their goals in incremental steps. *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Kadmas v. Dickinson Public School*, 487 U.S. 450, 462 (1988); *see also Milner v. Apfel*, 148 F.3d 812 (7th Cir. 1998); *In re Lara*, 731 F.2d 1455, 1460 (9th Cir. 1984). Under the "rational basis" test, federal courts must presume the validity of the challenged state action, and government classifications will not be set

aside unless there is no conceivable ground to justify them. *Heller v. Doe*, 509 U.S. 312 (1993).

Here plaintiff identifies no ostensible classification at all, let alone any classification along suspect lines. Individuals with disabilities, if that is a classification plaintiff intends, are not a suspect class for Equal Protection purposes and thus any hypothetical unequal burdens for students with disabilities will be upheld so long as they are rationally related to a legitimate government purpose. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (holding that to withstand equal protection review, legislation that distinguishes between those with mental retardation and those without must be rationally related to a legitimate governmental purpose); *see also Bd. of Trustees of the University of Ala. v. Garrett*, 531 U.S. at 367-68 (stating "[T]he result of *Cleburne* is that States are not required by the *Fourteenth Amendment* to make special accommodations for the disabled, so long as the actions towards such individuals are rational."). Here the IDEIA is for the benefit of disabled students; proceedings held pursuant to the IDEIA can in no sense be understood to be setting a classification based on disability. Even assuming somehow that it did, any policy or procedure followed by OAH must be upheld as long as it has a plausible relationship to a legitimate government purpose.

There is no evidence in the record to show that CDE and OAH have acted in an irrational manner in implementing IDEIA provisions. The evidence shows that there are legitimate reasons for the procedures followed by CDE and OAH. Plaintiff submitted no evidence to demonstrate that OAH is selectively enforcing rights of disabled students or that school districts are eschewing mediation in favor of due process hearings. TRO Br. at 14-15. In fact, special education disputes are settling or going to mediation in close to the same percentage now as they were when SEHO handled the due process hearings. Laba Dec. ¶¶ 11-12. Additionally, the claim that only 10% of the decisions are written in favor of students is incorrect. *See supra* note 3 and accompanying text. Plaintiff presented absolutely no evidence that OAH has violated the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff's arguments seems to assert claims for violations of IDEIA and the Equal Protection Clause of the Fourteenth Amendment, but plaintiff failed to show that there was any likelihood that he would be able to succeed on the merits with these claims.

III.

The Public Interest in Protecting and Serving Special Education Students and School Districts is Compelling.

Plaintiff's evidentiary burden in seeking provisional relief in advance of trial is more rigorous when the plaintiff seeks to enjoin governmental action taken in the public interest pursuant to statutory provisions. *Dep't of Parks and Recreation for the State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d 11118, 1124 (9th Cir. 2006); *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2nd Cir. 1995); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992). Here, OAH acts pursuant to federal and state law that ensures that all children with disabilities have available to them a free appropriate public education. *See Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d at 817-18 .

Plaintiff's claims, unsupported by law or fact, focus on the alleged inadequacy of due process hearings provided by OAH. *See* Complaint ¶¶ 7-9, 30, 34, 45-53. Administrative law judges from OAH handle hundreds of special education disputes a year and less than five percent of those disputes result in a due process hearing and decision. Laba Dec. ¶ 11. As a procedural matter, the parties to a special education dispute (usually parents or school districts) may seek a resolution of their disagreement through mediation prior to having a due process hearing. Laba Dec. ¶ 10. They may also engage in informal, non adversarial means of resolution after a request for hearing has been filed, or even after a hearing has commenced. Parties may pursue mediation and/or participate in settlement conferences conducted by administrative law judge from OAH. Laba Dec. ¶ 10. The vast majority of cases, more than 90%, are resolved through informal processes which eliminates the need for a formal due process hearing. Laba ¶¶ 10-11. An injunction enjoining CDE from contracting with OAH would impede the ability to resolve special education disputes – a vast majority of which are resolved without a due process hearing. The public interest in resolving more than 90% of special education disputes weighs in favor of denying a preliminary injunction which would impede OAH from performing *all* services – not just the complained-of due process hearings. Additionally, leaving aside the practical point of whether an adequate amount of substitute hearing officers could be found and trained in time,

CDE would lose the ability to contract with OAH which already provides well-qualified and trained administrative law judges to perform the due process hearings.

The public interest would be impaired by issuance of an injunction in this case because a vast majority of special education disputes, including those unrelated to ones that result in a due process hearing, would languish and not be resolved if OAH and CDE were enjoined from contracting. *See Caribbean Marine Services Co., Inc. v. Baldridge*, 844 F.2d 668 at 677 (finding that the government's and public's interest in ensuring equal employment opportunities for women and protecting marine mammals would be impaired by the issuance of a preliminary injunction and the balance of these interests outweighed male privacy rights on fishing vessels). Here, even if plaintiff's likelihood of success on the merits was great (which it is not), the injunction sought would work a severe hardship on the rights of the majority of parties whose special education disputes are resolved by OAH at and prior to a due process hearing.

IV.

The Balancing of Hardships Weighs Overwhelmingly Against the Requested Preliminary Injunction.

The overriding public interest in maintaining a dispute resolution process for special education students and school districts weighs overwhelmingly against granting the requested preliminary injunction.

As described above, plaintiff has no evidence of any irreparable harm, and even the speculative harm alleged by plaintiff would not have immediate effect. Plaintiff is challenging his own due process hearing decision in a separate action and, thus, his own educational opportunities are not at issue here. In the unlikely event that plaintiff may ultimately prevail on the merits of his claim in this case, there is no argument that his interests require immediate judicial intervention.

Conversely, as indicated above, enjoining CDE and OAH from contracting would prevent the vast majority of students and school districts from having their disputes resolved prior to a due process hearing and unsettle the process in hearings that do go forward. This would result in irreparable harm to the majority of parties seeking special education dispute resolution and would

be detrimental to the State of California.

CONCLUSION

For the foregoing reasons, defendant OAH respectfully requests that plaintiff's motion for a temporary restraining order and preliminary injunction be denied.

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Respectfully submitted,

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